UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39185

UNITED STATES
Appellee

v.

Blake R. POYNOR
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 2 May 2018

Military Judge: Mark W. Milam (arraignment); Marvin W. Tubbs II.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1. Sentence adjudged 10 September 2016 by GCM convened at Barksdale Air Force Base, Louisiana.

For Appellant: Major Patrick A. Clary, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Major Meredith L. Steer, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, MINK, and DENNIS, *Appellate Military Judges.*

Senior Judge JOHNSON delivered the opinion of the court, in which Judge MINK and Judge DENNIS joined.

JOHNSON, Senior Judge:

Appellant was found guilty by a military judge, consistent with his pleas, of one specification of assault consummated by a battery in violation of Arti-

cle 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. A general court-martial composed of officer and enlisted members found Appellant guilty, contrary to his pleas, of one specification of negligent dereliction of duty,[1] one specification of reckless driving, two specifications of assault consummated by a battery,[2] one specification of reckless endangerment, and one specification of unlawfully carrying on or about his person a concealed weapon to the prejudice of good order and discipline and of a nature to bring discredit upon the armed forces, in violation of Articles 92, 111, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 911, 928, 934.[3] The court-martial sentenced Appellant to a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the grade of E-1. The military judge granted Appellant 136 days of confinement credit against his sentence for illegal pretrial punishment. The convening authority approved the adjudged sentence.

Appellant raises four issues on appeal: (1) Whether Article 128, UCMJ, preempted the Government from charging Appellant with reckless endangerment by pointing a firearm under Article 134, UCMJ; (2) Whether the military judge erred by instructing the court members Appellant could be convicted of negligent dereliction of duty; (3) Whether negligent dereliction of duty is a lesser included offense (LIO) of willful dereliction of duty; and (4) Whether Appellant's conviction for negligent dereliction of duty for failing to register an AR-15 rifle is legally and factually sufficient. We find no error and affirm the findings and sentence.

I. BACKGROUND

In April 2013, while Appellant was stationed at Hurlburt Field, Florida, Appellant struck his then-wife KP in the face during a dispute. KP did not report the assault. In the summer of 2013, Appellant transferred to Barksdale Air Force Base (AFB), Louisiana. Appellant and KP later divorced.

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[1] Appellant was convicted of the negligent dereliction of duty as a lesser included offense under a charged willful dereliction of duty, of which Appellant was found not guilty.

[2] One of the assaults consummated by a battery of which Appellant was convicted was a lesser included offense under a charged aggravated assault, of which Appellant was found not guilty.

[3] The court members found Appellant not guilty of one specification of willful dereliction of duty, one specification of willful damage to nonmilitary property, two specifications of aggravated assault, and two specifications of assault consummated by a battery, in violation of Articles 92, 109, and 128, UCMJ, 10 U.S.C. §§ 892, 909, 928.

On 17 July 2013, Appellant attended an orientation briefing for newcomers to Barksdale AFB. One of the slides shown during the briefing advised the attendees that weapons kept in on-base residences must be registered with the Security Forces armory. Generally, a representative of the Security Forces squadron or another briefer also orally advised attendees of this requirement. Appellant lived on the base and kept several firearms in his residence, but never registered any firearms with Security Forces.

In January 2016, Appellant went on a weekend trip from Barksdale AFB to Dallas, Texas, with his then-girlfriend AWC, Appellant's friend (and subordinate) Senior Airman (SrA) TA, and SrA TA's female companion. Appellant drove the group to Dallas, and for various reasons he was upset throughout the trip. Appellant drove at an excessive speed, believed by SrA TA and AWC to have reached 90 or 100 miles per hour in a 70 mile-per-hour zone, weaving through traffic and driving onto the shoulder of the highway to pass other vehicles. Appellant brought a pistol with him on the trip. Concerned about Appellant's moody and erratic behavior, SrA TA removed the bullets from the pistol without Appellant's knowledge. After the group returned to Louisiana, SrA TA handed the bullets back to Appellant. When SrA TA did so, Appellant grabbed the bullets away from SrA TA, then grabbed SrA TA by the shirt and shoved him out of a doorway.

In approximately February 2016, Appellant pointed a loaded pistol at AWC during an argument.

On the morning of 2 April 2016, Appellant found AWC searching his phone without his permission after they spent the night together in his home. Appellant grabbed AWC's neck and squeezed with both hands for what AWC estimated to be 20 or 30 seconds. AWC, frightened by the assault, stayed in Appellant's house for several hours before attempting to leave without his knowledge. AWC went to her vehicle, which was parked at AWC's home nearby. When Appellant discovered AWC had departed and saw her leaving in her vehicle, he pursued her in his own vehicle. AWC ultimately called Security Forces, who responded and stopped Appellant's vehicle while he was still driving on the base. Security Forces personnel subsequently found Appellant's loaded pistol concealed in the center console of his vehicle.

II. DISCUSSION

A. Preemption

1. Law

We review de novo questions of statutory interpretation, including preemption. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015) (citations omitted); *United States v. Benitez*, 65 M.J. 827, 828 (A.F. Ct. Crim. App.

2007) (citation omitted). However, if an appellant forfeits an issue by not raising it at trial, appellate courts review it for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)). To prevail under the plain error standard, the appellant must demonstrate that there was error, the error was plain or obvious, and the error materially prejudiced a substantial right. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

The preemption doctrine "prohibits application of Article 134 to conduct covered by Articles 80 through 132." *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 60.c.(5)(a). In *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979), our superior court explained the preemption doctrine as the

> legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element. However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way.

Id. at 85 (citations omitted); *see United States v. Erickson*, 61 M.J. 230, 233 (C.A.A.F. 2005). Accordingly, the preemption doctrine only precludes prosecution under Article 134, UCMJ, where two elements are met: "(1) 'Congress intended to limit prosecution for . . . a particular area' of misconduct 'to offenses defined in specific articles of the Code,' and (2) 'the offense charged is composed of a residuum of elements of a specific offense.'" *United States v. Curry*, 35 M.J. 359, 360–61 (C.M.A. 1992) (omission in original) (quoting *United States v. McGuinness*, 35 M.J. 149, 151–52 (C.M.A. 1992)).

2. Analysis

Appellant contends the military judge committed plain error because the specification of reckless endangerment by pointing a pistol at AWC in violation of Article 134, UCMJ, of which he was convicted was preempted by the enumerated offense of aggravated assault in violation of Article 128, UCMJ. We disagree.

As the military judge instructed the court members, the elements of the offense of reckless endangerment as charged in this case consisted of:

> One, that between on or about February 2016 and on or about March 2016, at or near Barksdale Air Force Base, Louisiana,

> [Appellant] did engage in conduct, to wit: pointing a pistol at [AWC];
>
> Two, that the conduct was wrongful and reckless;
>
> Three, that the conduct was likely to produce death or grievous bodily harm to another person; and
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> Four . . . that under the circumstances [the conduct] was of a nature to bring discredit upon the armed forces.

See MCM, pt. IV, ¶ 100a.b. "Recklessness" in this context includes "conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. . . . The ultimate question is whether, under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others." *MCM*, pt. IV, ¶ 100a.c.(3).

The elements of aggravated assault by pointing a loaded firearm include:

> (i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
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> (ii) That the accused did so with a certain weapon, means, or force;
>
> (iii) That the attempt, offer, or bodily harm was done with unlawful force or violence; and
>
> (iv) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

MCM, pt. IV, ¶ 54.b.(4)(a). "An 'offer' type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required." *MCM*, pt. IV, ¶ 54.c.(1)(b)(ii).

Thus the charged offense of reckless endangerment under Article 134 is not composed of a residuum of elements of aggravated assault—or, for that matter, simple assault—because reckless endangerment requires proof of recklessness, whereas aggravated assault may be proven by demonstrating the lesser intent of culpable negligence.[4] Put another way, proving the ele-

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[4] Under *United States v. Fosler*, 70 M.J. 225, 232 (C.A.A.F. 2011), the Government must both allege and prove the terminal element of an offense charged under Clauses 1 or 2 of Article 134, UCMJ; specifically, that the accused's conduct was either prejudicial to good order and discipline or of a nature to bring discredit upon the armed

(Footnote continues on next page)

ments of aggravated assault as applied to this case would not necessarily prove the elements of reckless endangerment.

Appellant's reliance on *United States v. McCormick*, 30 C.M.R. 26, 28 (C.M.A. 1960), is misplaced. In *McCormick*, our superior court held "a simple assault and battery may not be converted into another offense under . . . Article 134[ ] by allegation and proof of the additional factor of the victim's age." *Id.* First, *McCormick* significantly antedates our superior court's current formulation of the preemption doctrine as described in *Kick* and *Curry*, which include the requirement that the Article 134 offense be composed of a residuum of elements of the enumerated offense. Second, Appellant's case is unlike *McCormick* because the Government has not simply grafted an additional, aggravating element onto an existing Article 128 offense. As described above, the mens rea requirement for reckless endangerment is fundamentally different from that for aggravated assault by pointing a loaded weapon.

In addition, Appellant fails to demonstrate Congress intended to preclude the Government from charging reckless conduct with firearms likely to produce death or grievous bodily harm under Article 134. Appellant asserts, correctly, that the Government might have charged him with aggravated assault under Article 128, but that alone is insufficient to establish preemption. *See Curry*, 35 M.J. at 360–61. Moreover, as the Government notes, this court has previously affirmed a conviction for reckless endangerment in violation of Article 134 based on pointing a loaded firearm at the victim. *See United States v. Martinez*, No. ACM S31779, 2011 CCA LEXIS 297, at *1–5, 16, 22 (A.F. Ct. Crim. App. 27 Oct. 2011) (unpub. op.), *aff'd*, 71 M.J. 303 (C.A.A.F. 2012) (mem.).

Accordingly, we conclude the Government was not preempted from charging Appellant with reckless endangerment in violation of Article 134, UCMJ. Therefore, the military judge did not commit plain error by failing to intervene *sua sponte* in the absence of an objection by trial defense counsel.

B. Negligence as Mens Rea for Dereliction of Duty

1. Law

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forces. *See* 10 U.S.C. § 934; *MCM*, pt. IV, ¶ 60.b.(1). However, we have previously declined to conclude the terminal element requirement for Article 134 offenses effectively eliminates the preemption doctrine. *See United States v. Long*, Misc. Dkt. No. 2014-02, 2014 CCA LEXIS 386, at *11–13 (A.F. Ct. Crim. App. 2 Jul. 2014). Accordingly, we do not rest our opinion that reckless endangerment is not composed of a residuum of the elements of aggravated assault upon the existence of the terminal element.

Generally, "[q]uestions pertaining to the substance of a military judge's instructions, as well as those involving statutory interpretation, are reviewed de novo." *United States v. Caldwell*, 75 M.J. 276, 280 (C.A.A.F. 2016) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008); *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999)). However, where there is no objection at trial we review for plain error. *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013) (citing *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012)). Under the plain error standard, the appellant must demonstrate "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* at 193–94 (quoting *Girouard*, 70 M.J. at 11 (internal quotation marks omitted)).

2. Analysis

Appellant was charged with willful dereliction of duty in violation of Article 92, UCMJ, by willfully failing to register with the Security Forces armory the firearms he kept in his on-base residence, as he knew it was his duty to do. At trial, the Government requested the military judge instruct the court members on the LIO of dereliction of duty by neglect, also under Article 92. The civilian defense counsel responded that the element of negligent dereliction of duty by neglect that an accused "should have known" of a duty was not necessarily a lesser included element under the requirement for willful dereliction of duty that an accused actually knew of the duty. However, the Defense did not object on the basis that negligent dereliction of duty is not a viable offense.

The military judge did instruct the court members on the LIO of "negligent dereliction of duty," and the court members convicted Appellant of the LIO. As the military judge instructed, the offense of dereliction of duty by neglect in this case included the following elements:

> One, that [Appellant] had a certainly [sic] prescribed duty, that is, to register firearms with the Second Security Forces Squadron Armory;
>
> Two, that [Appellant] knew or reasonably should have known of the assigned duty; and
>
> Three, that at or near Barksdale Air Force Base, Louisiana, between on or about 1 June 2015 and on or about 2 April 2016, [Appellant] was through neglect derelict in the performance of that duty by failing to register firearms . . . with the Second Security Forces Squadron Armory.

The military judge further instructed that proof of this offense required the court members to find Appellant's dereliction was done "negligently," meaning "an act or failure to act by a person under a duty to use due care, which

demonstrates a lack of care which a reasonably prudent person would have used under the same or similar circumstances."

Appellant concedes longstanding precedent from our superior court established that simple negligence is the requisite mens rea for dereliction of duty by neglect in violation of Clause 3 of Article 92, UCMJ. *See United States v. Lawson*, 36 M.J. 415, 416 (C.M.A. 1993). However, he contends the United States Supreme Court's decision in *United States v. Elonis*, 135 S. Ct. 2001 (2015), fatally undermines this precedent. In *Elonis*, the Court concluded that simple negligence was not sufficient to support a conviction for communicating a threat where the statute in question was silent as to the requisite mens rea. *Id.*. at 2012–13. In doing so, the Court observed, *inter alia*, that it has "long been reluctant to infer that a negligence standard was intended in criminal statutes." *Id.* at 2004 (quoting *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J. concurring)). However, as our superior court has recognized, the true import of *Elonis* is not that negligence is an insufficient mens rea for a criminal offense; rather, it is that where a criminal statute is silent as to the requisite mens rea, courts must attempt to discern the legislative intent or, failing that, read into the statute the mens rea necessary to separate wrongful conduct from otherwise innocent conduct, whether that be general intent, negligence, recklessness, knowledge, or specific intent. *See United States v. Haverty*, 76 M.J. 199, 203–04, 208 (C.A.A.F. 2017) (holding recklessness was the requisite mens rea for conviction for violation of an Army regulation prohibiting hazing).

In *United States v. Blanks*, 77 M.J. 239, 241 (C.A.A.F. 2018), our superior court recently reaffirmed that negligence remains "an appropriate mens rea for certain dereliction offenses." In *Blanks*, as in Appellant's case, the military judge instructed the court members on negligent dereliction of duty as a LIO of a charged willful dereliction of duty in violation of Article 92, Clause 3—in that case by failing to provide adequate financial support to a dependent spouse. *Id.* As in Appellant's case, trial defense counsel did not object to the instruction on the basis that negligence was not an authorized mens rea for the offense. *Id.* The court found no reason to overrule its precedent establishing simple negligence as an adequate mens rea for dereliction of duty by neglect under Article 92, finding those cases "have 'effectively become part of the statutory scheme.'" *Id.* at 243 (quoting *Kimble v. Marvel Entm't., LLC*, 135 S. Ct. 2401, 2409 (2015)).

In light of *Blanks*, Appellant cannot prevail. We find no error, plain or otherwise, in the military judge's instruction that negligence was the requisite mens rea for Appellant to be found guilty of dereliction of duty by neglect in violation of Article 92, UCMJ.

C. Lesser Included Offense

1. Law

Whether an offense is an LIO is a question of law we review de novo. *Wilkins*, 71 M.J. at 412 (quoting *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011)). Similarly, we review de novo the substantive instructions a military judge provides to court members. *Caldwell*, 75 M.J. at 280.

An offense is an LIO of a charged offense if the elements of the LIO would necessarily be proven by proving the elements of the charged offense. *Id.* (citing *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010)).

2. Analysis

As noted above, at trial the civilian defense counsel objected to the military judge's instruction on the LIO of negligent dereliction of duty on the basis that the element of negligent dereliction that an accused "should have known" of a duty was not necessarily included under the element of willful dereliction of duty that an accused actually knew of the duty. However, the Defense could cite no case to support its position. The military judge reasoned that "should have known" was a lesser included intent of "knew" and he gave the LIO instruction.

On appeal, Appellant maintains essentially the same argument. He still does not cite any case for the specific proposition that negligent dereliction of duty is not an LIO of willful dereliction of duty. Instead, he contends that comparing the elements of the two offenses demonstrates negligent dereliction of duty contains elements not contained in willful dereliction of duty, specifically, that the accused "reasonably should have known" of the duty in question, and that there be "neglect." Therefore, he contends, it is not an LIO.

We are not persuaded. The question is not whether the elements of the two offenses include identical words. *See Wilkins*, 71 M.J. at 412 (quoting *Alston*, 69 M.J. at 216) ("The test does not require that the 'offenses at issue employ identical statutory language.'")). Rather, the test is whether, "employing normal rules of statutory interpretation and construction," proving the greater offense necessarily proves the lesser offense. *Id.*

As the military judge instructed the court members, the charged offense of willful dereliction of duty in this case included the following elements:

> One, that [Appellant] had a certain prescribed duty, that is, to register firearms with the Second Security Forces Squadron Armory;
>
> Two, that [Appellant] actually knew of the assigned duty; and

> Three, that at or near Barksdale Air Force Base, Louisiana, between on or about 1 June 2015 and on or about 2 April 2016, [Appellant] was willfully derelict in the performance of that duty by failing to register firearms . . . with the Second Security Forces Squadron Armory.

The LIO of dereliction of duty by neglect in this case included the following elements:

> One, that [Appellant] had a certainly [sic] prescribed duty, that is, to register firearms with the Second Security Forces Squadron Armory;
>
> Two, that [Appellant] knew or reasonably should have known of the assigned duty; and
>
> Three, that at or near Barksdale Air Force Base, Louisiana, between on or about 1 June 2015 and on or about 2 April 2016, [Appellant] was through neglect derelict in the performance of that duty by failing to register firearms . . . with the Second Security Forces Squadron Armory.

Comparing the elements, it is readily apparent that to prove Appellant "actually knew" of the assigned duty under willful dereliction would necessarily prove that he "knew or reasonably should have known" of the duty under negligent dereliction. Similarly, we are satisfied that to prove the dereliction was "willful" would necessarily prove that there was "neglect." "Neglect" as the term is used in Article 92 is not specifically defined, but in general it "[m]ay mean to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in the doing or omission of a given act." *Neglect*, BLACK'S LAW DICTIONARY (6th ed. 1990). As discussed above, the United States Court of Appeals for the Armed Forces has long held that simple negligence is the required mens rea for dereliction of duty through neglect under Article 92. *See Blanks*, 77 M.J. at 241; *Lawson*, 36 M.J. at 416. Again, as the military judge instructed the court members, "negligence" means "an act or failure to act by a person under a duty to use due care, which demonstrates a lack of care which a reasonably prudent person would have used under the same or similar circumstances." Willfully failing to perform a duty necessarily demonstrates a lack of care that a reasonably prudent person would have exercised.

As the Government notes, this court has in recent years affirmed convictions for negligent dereliction of duty as an LIO of a charge of willful dereliction of duty. *See United States v. DeSilva*, No. ACM S32335, 2016 CCA LEXIS 588, at *6 (A.F. Ct. Crim. App. 4 Oct. 2016) (unpub. op.) (affirming LIOs of negligent dereliction of duty after finding guilty pleas to willful dereliction of

duty improvident); *United States v. Loveridge*, No. ACM 37872, 2014 CCA LEXIS 565, at *12–14 (A.F. Ct. Crim. App. 5 Aug. 2014) (unpub. op.) (finding conviction by military judge of negligent dereliction of duty LIO legally and factually sufficient); *see also United States v. Craion*, 64 M.J. 531, 534 n.1 (A. Ct. Crim. App. 2006) (noting an accused may be punished for negligent dereliction of duty as an LIO of willful dereliction of duty). We find no reason to change course now. The military judge did not err in instructing the court members on the LIO of negligent dereliction of duty.

D. Legal and Factual Sufficiency

1. Additional Background

At trial, Technical Sergeant (TSgt) JL testified that when Security Forces personnel searched Appellant's vehicle, in addition to the concealed pistol they found an "AR magazine loaded with 11 rounds of 556 ammunition." TSgt JL further testified that when Security Forces personnel searched Appellant's house they found four rifles in a display case, the lower receiver of an AR-15 rifle, and 5.56 millimeter (mm) ammunition "throughout the entire house." According to TSgt JL, the 5.56 mm ammunition could not have been used with either the pistol or the intact rifles found in the display case. However, no barrel for an AR-15 rifle was found in Appellant's residence.

The Government introduced testimony from SE, a former Airman who had been Appellant's subordinate and friend. SE testified he arrived at Barksdale AFB in November 2014 and lived there for "about a year and a half." During that time SE visited Appellant's house and Appellant showed SE his weapons. SE could not recall the exact dates, but testified the first instance was "about when" SE first arrived at Barksdale AFB. SE further testified that "last summer" Appellant showed him some "old" rifles that were in Appellant's gun case. According to SE, on "that day" Appellant also showed him "one or two AR-15 style rifles."

2. Law

We review issues of legal and factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia* 443 U.S. 307, 319 (1979)); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are bound to

draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325; *see also United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

3. Analysis

Appellant challenges the legal and factual sufficiency of his conviction for negligent dereliction of duty by failing to register an AR-15 rifle with the Security Forces armory between on or about 1 June 2015 and on or about 2 April 2016.[5] Appellant contends that the lower receiver of an AR-15 that was found in his home on 2 April 2016, without a barrel, did not constitute a "firearm" for purposes of his duty to register such items with the Security Forces armory. We agree. However, the testimony of SE, reinforced by the AR-15 ammunition and lower receiver recovered from Appellant's vehicle and home, establishes that Appellant did, during the charged timeframe, possess an unregistered, intact AR-15 in his residence.

Appellant does not contend SE was either mistaken or lying when he testified that Appellant showed him one or two AR-15 rifles in Appellant's residence. Rather, Appellant interprets SE's testimony to indicate Appellant showed SE the AR-15(s) "about when" SE first arrived at Barksdale AFB in November 2014, which Appellant contends is substantially outside the charged time frame of between on or about 1 June 2015 and on or about 2 April 2016. However, Appellant is mistaken. SE's testimony indicates he visited Appellant's home for the *first time* soon after he arrived, but that he visited more than once. In particular, he testified that he saw the AR-15(s) on the same occasion that Appellant showed him the two "old" rifles, which was "about last summer." The summer of 2015 would have been during the charged time frame.

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[5] Appellant does not contest the legal or factual sufficiency of his conviction with respect to the five other firearms listed in the specification.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," the evidence was legally sufficient to support Appellant's conviction. *Barner*, 56 M.J. at 134. Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 325. Appellant's conviction of negligent dereliction of duty with respect to the AR-15 is therefore both legally and factually sufficient.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court